



**To the Honorable Council
City of Norfolk, Virginia**

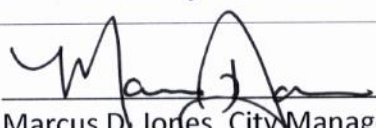
April 12, 2016

From: Charles E. Rigney, Sr. Director
Department of Development

Subject: An ordinance authorizing the City of Norfolk to enter into a performance agreement with the Economic Development Authority of the City of Norfolk and Norfolk Southern Corporation in order to facilitate a grant from the Commonwealth Opportunity Fund

Reviewed: 
Peter H. Chapman, Deputy City Manager

Ward/Superward: 2/6

Approved: 
Marcus D. Jorjes, City Manager

Item Number:

PH-1

- I. **Recommendation** Adopt Ordinance
- II. **Applicant** Economic Development Authority of the City of Norfolk
- III. **Description**

This agenda item is an ordinance to authorize the City of Norfolk (the "city") to enter into a performance agreement with the Economic Development Authority (the "EDA") of the City of Norfolk and Norfolk Southern Corporation ("Norfolk Southern") in order to facilitate a grant from the Commonwealth Opportunity Fund.

IV. **Analysis**

The city has been awarded a grant of, and expects to receive, \$1,925,000.00 from the Commonwealth's Development Opportunity Fund ("COF Grant") through the Virginia Economic Development Partnership ("VEDP") for the purpose of inducing Norfolk Southern Corporation to make capital improvements. Norfolk Southern will be making a significant capital investment and creating and maintaining a significant number of new jobs.

- VEDP is willing to provide the COF Grant funds to the EDA with the expectation that the Authority will provide the funds to Norfolk Southern, provided they meet certain criteria relating to capital investment and new jobs maintenance in the city.

V. Financial Impact

Norfolk Southern's capital improvements will total at least \$8,200,000.00 and create and maintain at least 165 new jobs.

VI. Environmental

N/A

VII. Community Outreach/Notification

Public notification for this agenda item was conducted through the city's agenda notification process.

VIII. Board/Commission Action

N/A

IX. Coordination/Outreach

This letter and ordinance have been coordinated with the Department of Development and the City Attorney's Office.

Supporting Material from the City Attorney's Office:

- Ordinance
- Performance Agreement

3/7/16mr

Form and Correctness Approved: 

By 

Office of the City Attorney

Contents Approved:

By 

DEPT. Development

NORFOLK, VIRGINIA

ORDINANCE No.

AN ORDINANCE AUTHORIZING THE CITY TO ENTER
INTO A PERFORMANCE AGREEMENT WITH THE
ECONOMIC DEVELOPMENT AUTHORITY OF THE CITY OF
NORFOLK AND NORFOLK SOUTHERN CORPORATION.

- - -

WHEREAS, the City of Norfolk (the "City") has been awarded a grant in the amount \$1,925,000.00 from the Commonwealth's Development Opportunity Fund (a "COF Grant") through the Virginia Economic Development Partnership Authority ("VEDP") for the purpose of inducing Norfolk Southern Corporation ("Norfolk Southern") to make capital improvements, including renovations and employee training improvements, to its office and headquarters facility in the City (the "Facility") and thereby making a significant Capital Investment, and creating and Maintaining a significant number of New Jobs, as such capitalized terms are defined in the Performance Agreement attached hereto; and

WHEREAS, VEDP is willing to provide the funds directly to the Economic Development Authority of the City of Norfolk (the "EDA") with the expectation that the EDA will provide the funds to or for the use of Norfolk Southern, provided that Norfolk Southern promises to meet certain criteria relating to the Capital

Investment and New Jobs and that the City provides a comparable local incentive, which shall be in the form of discounted parking rates; and

WHEREAS, the EDA, the City and Norfolk Southern desire to set forth their understanding and agreement as to the payout of the COF Grant, the use of the COF Grant proceeds, the obligations of Norfolk Southern regarding Capital Investment and New Job creation, and the repayment by Norfolk Southern of all or part of the COF Grant and the subsidy provided by the discounted parking rates under certain circumstances; and

WHEREAS, Norfolk Southern has stated that the capital improvements to the Facility will entail a capital expenditure of at least \$9,000,000.00; and

WHEREAS, Norfolk Southern has stated that the capital improvements to the Facility will further entail the creation and Maintenance of at least 165 New Jobs at the Facility; now, therefore,

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the Performance Agreement between Norfolk Southern Corporation, the Economic Development Authority of the City of Norfolk, and the City of Norfolk, a copy of which is attached hereto, wherein the City of Norfolk agrees to the terms and conditions of the payout of the COF Grant, the use of the COF Grant proceeds, the obligations of Norfolk Southern regarding Capital Investment and New Job creation, as such terms are defined in the Performance Agreement, and the repayment by Norfolk Southern under certain circumstances of all or part of the COF Grant and the parking incentive to be

provided by the City, is hereby approved.

Section 2:- That the City Manager is authorized to correct, amend, or revise the Performance Agreement as he may deem necessary in order to carry out the intent of the Council and to execute the Performance Agreement, as corrected, amended, or revised in accordance herewith, for and on behalf of the City, subject however to approval as to form and correctness by the Office of the City Attorney.

Section 3:- That this ordinance shall be in effect as of the date of its adoption.

COMMONWEALTH'S DEVELOPMENT OPPORTUNITY FUND

PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** made and entered as of the ____ day of April, 2016, by and among **NORFOLK SOUTHERN CORPORATION** (the "Company"), a corporation authorized to transact business in the Commonwealth of Virginia (the "Commonwealth"), the **ECONOMIC DEVELOPMENT AUTHORITY OF THE CITY OF NORFOLK** (the "Authority"), a political subdivision of the Commonwealth, and the **CITY OF NORFOLK** (the "Locality"), a municipal corporation of the Commonwealth.

WITNESSETH:

WHEREAS, the Locality has been awarded a grant of and expects to receive \$1,925,000.00 from the Commonwealth's Development Opportunity Fund (a "COF Grant") through the Virginia Economic Development Partnership Authority ("VEDP"), for the purpose of inducing the Company to make capital improvements, including renovations and employee training improvements, to its office and headquarters facility in the Locality (the "Facility") and thereby making a significant Capital Investment, and creating and Maintaining a significant number of New Jobs, as such capitalized terms are hereinafter defined;

WHEREAS, the VEDP is willing to provide the funds directly to the Authority on the condition that the Authority will provide the funds to or for the use of the Company, provided that the Company meets certain criteria relating to the Capital Investment and New Jobs and that the Locality provides a comparable local incentive;

WHEREAS, the Authority, the Locality and the Company desire to set forth their understanding and agreement as to the payout of the COF Grant, the use of the COF Grant proceeds, the obligations of the Company regarding Capital Investment and New Job creation, and the repayment by the Company of all or part of the COF Grant and all or part of the local incentive to be provided by the Locality under certain circumstances;

WHEREAS, the Company has stated that the capital improvements to the Facility will entail a capital expenditure of at least \$8,200,000.00;

WHEREAS, the Company has stated that the capital improvements to the Facility will further entail the creation and Maintenance of at least 165 New Jobs at the Facility; and

WHEREAS, the stimulation of the additional tax revenue and economic activity to be generated by the Capital Investment and New Jobs constitutes a valid public purpose for the expenditure of public funds and is the animating purpose for the COF Grant.

NOW, THEREFORE, in consideration of the foregoing, the mutual benefits, promises and undertakings of the parties to this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows.

Section 1. Definitions.

For the purposes of this Agreement, the following terms shall have the following definitions:

“Capital Investment” means a capital expenditure by the Company in real property, tangible personal property, or both, at the Facility excluding the purchase of land or existing real property improvements. The Capital Investment must be in capital improvements at the Facility made after April 1, 2015 and on or before the Initial Performance Date. The purchase or lease of furniture, fixtures, machinery and equipment, including any purchase under a capital lease, and building up-fit and improvements entered into or made after April 1, 2015, will qualify as Capital Investment.

“Maintain,” “Maintaining,” or “Maintenance” means that the New Jobs created pursuant to the COF Grant will continue without interruption from the Initial Performance Date through the Subsequent Performance Date. Positions for the New Jobs will be treated as Maintained during periods in which such positions are not filled due to (i) temporary reductions in the Company’s employment levels (so long as there is active recruitment for open positions), (ii) strikes, and (iii) other temporary work stoppages.

“Initial Performance Date” means June 1, 2016.

“New Job” means new permanent full-time employment of an indefinite duration at the Facility for which the standard fringe benefits are provided by the Company for the employee, and for which the Company pays an average annual wage (i.e. the average annual wage of all New Jobs counted toward the Target (as hereinafter defined) measured on or after the Initial Performance Date of at least \$97,000.00. Each New Job must require a minimum of either (i) 35 hours of an employee’s time per week for the entire normal year of the Company’s operations, which “normal year” must consist of at least 48 weeks, or (ii) 1,680 hours per year. Seasonal or temporary positions, positions created when a job is shifted from an existing location in the Commonwealth and positions with construction contractors, vendors, suppliers and similar multiplier or spin-off jobs shall not qualify as New Jobs. However, positions previously located in the Company’s offices and facilities in Roanoke, Virginia shall qualify as New Jobs. Net New Jobs in the Commonwealth for contractors or employees of contractors who provide dedicated full-time service to the Company may count as New Jobs, even if the Company is not directly paying the wages or providing fringe benefits, if the other conditions in this paragraph have been satisfied. The New Jobs must be in addition to the 460 full-time jobs at the Facility on April 1, 2015.

“Subsequent Performance Date” means June 1, 2026.

“Targets” means the Company’s obligations to make Capital Investments at the Facility of at least \$8,200,000.00 and to create and Maintain at least 165 New Jobs at the Facility, all as of the Initial Performance Date. As stated herein, “Targets” includes the Company’s obligation to Maintain at least 165 New Jobs at the Facility from the Initial Performance Date to the Subsequent Performance Date.

“Virginia Code” means the Code of Virginia of 1950, as amended.

Section 2. Targets; Statutory Criteria.

The Company will expand and operate the Facility in the Locality, make a Capital Investment of at least \$8,200,000.00, and create at least 165 New Jobs at the Facility, all as of the Initial Performance Date. Further, the Company will Maintain at least 165 New Jobs at the Facility from the Initial Performance Date to the Subsequent Performance Date.

The Locality and the Authority hereby strongly encourage the Company to ensure that at least 30% of the New Jobs are offered to "Residents" of the Commonwealth, as defined in Virginia Code Section 58.1-302. In pertinent part, that definition includes natural persons domiciled in Virginia or natural persons who, for an aggregate of more than 183 days of the year, maintained a place of abode within the Commonwealth, whether domiciled in the Commonwealth or not.

The parties understand that: the average annual wage of the New Jobs of at least \$97,000.00 is more than the prevailing average annual wage in the Locality of \$48,947.00; the Locality is a high-unemployment locality, with an unemployment rate for 2014, which is the last year for which such data is available, of 6.4% as compared to the 2014 statewide unemployment rate of 5.2%; and the Locality is a high-poverty locality, with a poverty rate for 2014, which is the last year for which such data is available, of 23.4% as compared to the 2014 statewide poverty rate of 11.8%.

Section 3. Disbursement of COF Grant.

By no later than April 30, 2016, the Locality will request from the VEDP the disbursement to the Authority of the COF Grant. If not so requested by the Locality by April 30, 2016, this Agreement will terminate. The Locality and the Company will be entitled to reapply for a COF Grant thereafter based upon the terms, conditions and availability of funds at that time.

The COF Grant in the amount of \$1,925,000.00 is expected to be paid promptly by the VEDP to the Authority. Within 30 days of its receipt of the COF Grant proceeds, the Authority will disburse the entire COF Grant proceeds to the Company as an inducement to the Company to achieve the Targets at the Facility.

Section 4. Local Incentive.

(a) *Commonwealth-Level Incentives:* VEDP has estimated that the Commonwealth will reach its "break-even point" by the Subsequent Performance Date. The break-even point compares new revenues realized as a result of the Capital Investment and New Jobs at the Facility with the Commonwealth's expenditures on incentives, including but not limited to the COF Grant. With regard to the Facility, the Commonwealth, through the VEDP, expects to provide incentives to the Company in the following amounts:

<u>Category of Incentive:</u>	<u>Total Amount</u>
COF Grant	\$1,925,000.00

(b) The Locality will provide to the Company the following incentive for the Facility (the "Parking Subsidy") (the details of which will be documented in a separate agreement between the Locality and the Company (the "Parking Subsidy Agreement")):

<u>Category of Incentive:</u>	<u>Total Amount</u>
Subsidized Parking Fees	\$2,251,260.00

If, by the Subsequent Performance Date, the value of the Parking Subsidy realized or committed by the Locality to the Company pursuant to the Parking Agreement totals less than the \$1,925,000.00 COF Grant local match requirement, the Locality, subject to appropriation, will make an additional grant to the Authority for payment to the Company of the amount by which the \$1,925,000.00 COF Grant local match requirement exceeds the value of the Parking Subsidy realized or committed by the City at the Initial Performance Date, so long as the Company has met its Targets.

The Parking Subsidy represents costs savings to the Company and its employees. The Parking Subsidy will be achieved by reduced parking rates in the City's parking facility, as more particularly described in the Parking Agreement between the Locality and the Company.

Section 5. Repayment Obligation.

(a) *If Eligibility Requirements are Not Met:* This Agreement requires that the Company make a Capital Investment of at least \$8,200,000.00 in the Facility and Maintain at least 165 New Jobs at the Facility in each case by the Initial Performance Date in order to remain eligible for the COF Grant. Failure by the Company to meet either of these minimum eligibility requirements by the Initial Performance Date shall constitute a failure to achieve the conditions of this Agreement and the entire COF Grant shall be repaid by the Company to the Authority and the value of the Parking Subsidy previously disbursed to or realized by the Company shall be reimbursed to the Locality and the Locality's obligation to provide additional Parking Subsidy incentives shall be of no further force or effect, with no further damages owed by the Company to either the Locality or the Authority.

(b) *If New Jobs Eligibility Requirement is Met but not Maintained:* If the New Jobs Target is met on or before the Initial Performance Date and at least 90% of the New Jobs Target is continuously maintained to the Subsequent Performance Date, the Company shall have no obligation to repay any portion of the COF Grant or the Parking Subsidy. If the Company has not continuously maintained at least 90% of the New Jobs Target to the Subsequent Performance Date, the Company shall repay to the Authority that portion of the COF Grant that is proportional to the average number of New Jobs Maintained under the New Jobs Target (which average shall be calculated from the Initial Performance Date to the Subsequent Performance Date), as hereinafter described and the Company shall repay to the Locality that portion of the value of the Parking Subsidy that is proportional to the average number of New Jobs Maintained under the New Jobs Target, with no further damages owed by the Company to either the Locality or the Authority. For example, if at the Subsequent Performance Date only an average of 82.5 New Jobs have been created and Maintained since the Initial Performance Date (reflecting achievement of 50% of the New Jobs Target), the Company shall repay to the Authority 50% (\$962,500) of the COF Grant,

and 50% of the value of the Parking Subsidy realized (whether or not the parking spaces provided were fully utilized) by the Company since June 1, 2016 (the commencement date of the Parking Subsidy) shall be reimbursed to the Locality. The current value of the Parking Subsidy is \$18,760.50 per month based on a \$121.50 per space reduction in the monthly parking rate for the Commercial Place Garage and a \$101.70 per space reduction in the monthly parking rate for the Fountain Park Garage.

(c) *Determination of Inability to Comply:* If the Authority, the Locality or the VEDP shall reasonably determine at any time that the Company is unable or unwilling to meet its Targets by the Initial Performance Date (in each case, a "Determination Date") and if the Authority, the Locality or the VEDP shall have promptly notified the Company of such determination, the Company shall repay the entire COF Grant to the Authority and the value of the Parking Subsidy previously disbursed to or realized by the Company shall be reimbursed to the Locality and the Locality's obligation to provide additional Parking Subsidy incentives shall be of no further force or effect, with no further damages owed by the Company to either the Locality or the Authority. Such a determination will be based on objective information such as a filing by or on behalf of the Company under Chapter 7 of the U.S. Bankruptcy Code, the liquidation of the Company, an abandonment of the Facility by the Company or other similar significant event that demonstrates the Company will be unable or is unwilling to satisfy the Targets for the COF Grant.

(d) *Repayment Dates:* ***The Company's repayment obligations shall be due and payable from the Company to the Authority and to the Locality within ninety days of the Initial Performance Date, the Subsequent Performance Date or the Determination Date, as applicable.*** Any COF Grant moneys repaid by the Company to the Authority hereunder shall be repaid by the Authority to the Locality promptly and shall be repaid by the Locality promptly to the VEDP for redeposit into the Commonwealth's Development Opportunity Fund. Upon actual knowledge of any repayment obligation by the Company under this Agreement, the Authority shall use its best efforts to recover such funds, including legal action for breach of this Agreement. Neither the Locality nor the Authority shall have any responsibility for the repayment of any sums hereunder unless said sums have been received by the Authority from the Company.

Section 6. Company Reporting.

The Company shall provide, at the Company's expense, reports to VEDP (but not to the Authority or the Locality) on the form attached hereto as Appendix A of the Company's progress toward achieving the Targets and, from and after the Initial Performance Date, the level of New Jobs Maintained during each year within the reporting period. Such reports will be provided annually, beginning on September 1, 2016 and on each September 1 thereafter to and including September 1, 2026 and, except for the first such report (which will cover only a partial year) shall cover the period through the prior June 1. The Company shall provide such additional information regarding the Targets as the Authority, the Locality or the VEDP may reasonably request in writing from time to time.

With each such annual report, the Company shall report to VEDP the amount paid by the Company in the prior calendar year in Virginia corporate income tax. VEDP has promised to the Company that such information is confidential proprietary information that is exempt from public disclosure under the Virginia Freedom of Information Act and that such information will be used

by VEDP solely in calculating aggregate return on invested capital analyses for purposes of gauging the overall effectiveness of economic development incentives.

If the Company wishes to count as New Jobs employees of contractors, to the extent permitted in the definition of "New Jobs" in Section 1, the Company is responsible for assembling and distributing the documentation necessary to verify such New Jobs, including whether such jobs are net new jobs in the Commonwealth.

Section 7. Notices.

Notices and communications between the Parties shall be given either by (i) personal delivery, (ii) delivery by a reputable document delivery service that provides a receipt showing date and time of delivery, or (iii) mailing utilizing a certified or first class mail postage prepaid service of the United States Postal Service that provides a receipt showing date and time of delivery, addressed to:

if to the Company, to:

Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
Attention: Vice President Human Resources

with a copy to:

Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
Attention: Vice President Law

if to the Locality, to:

City of Norfolk
Office of the City Manager
810 Union Street, 1101 City Hall Bldg.
Norfolk, VA 23510
Facsimile: 757-664-4239
Attention: City Manager

with a copy to:

City of Norfolk
City Attorney's Office
810 Union Street, 900 City Hall Bldg.
Norfolk, VA 23510
Facsimile: 757-664-4201
Attention: City Attorney

if to the Authority, to:

Economic Development Authority of the City
of Norfolk
500 E. Main Street, Suite 1500
Norfolk, Virginia 23510
Facsimile: (757) 441-2910
Email: jared.chalk@norfolk.gov
Attention: Jared Chalk, Secretary/Treasurer

With a copy to:

Kaufman & Canoles, P.C.
150 W. Main Street, Suite 2100
Norfolk, Virginia 23510
Facsimile: (888) 360-9092
Email: glconsolvo@kaufcan.com
Attention: George L. Consolvo, Esq.

if to VEDP, to:

Virginia Economic Development Partnership
East Byrd Street, 19th Floor
Post Office Box 798 (zip: 23218-0798)
Richmond, Virginia 23219
Facsimile: (804) 545-5611
Email: mbriley@yesvirginia.org
Attention: President and CEO

with a copy to:

Virginia Economic Development Partnership
East Byrd Street, 19th Floor
Post Office Box 798 (zip: 23218-0798)
Richmond, Virginia 23219
Facsimile: (804) 545-5611
Email: smcninch@yesvirginia.org
Attention: General Counsel

Section 8. Miscellaneous.

(a) *Entire Agreement; Amendments:* This Agreement constitutes the entire agreement among the parties hereto as to the COF Grant and may not be amended or modified, except in writing, signed by each of the parties hereto. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The Company may not assign its rights and obligations under this Agreement without the prior written consent of the Authority, the Locality and the VEDP, which consent shall not be unreasonably withheld.

(b) *Governing Law; Venue:* This Agreement is made, and is intended to be performed, in the Commonwealth and shall be construed and enforced by the laws of the Commonwealth.

(c) *Counterparts:* This Agreement may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument.

(d) *Severability:* If any provision of this Agreement is determined to be unenforceable, invalid or illegal, then the enforceability, validity and legality of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law.

(e) *Attorney's Fees:* Attorney's fees shall be paid by the party incurring such fees.

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IN WITNESS WHEREOF, the parties hereto have executed this Performance Agreement as of the date first written above.

NORFOLK SOUTHERN CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

**ECONOMIC DEVELOPMENT
AUTHORITY OF THE CITY OF
NORFOLK, VIRGINIA**

By: _____
Name: _____
Title: _____
Date: _____

APPROVED AS TO CONTENTS:

Executive Director, Economic Development
Authority of the City of Norfolk

APPROVED AS TO FORM AND CORRECTNESS:

Counsel to the Economic Development
Authority of the City of Norfolk

CITY OF NORFOLK, VIRGINIA

By: _____
Name: Marcus D. Jones
Title: City Manager
Date: _____

ATTEST:

City Clerk

APPROVED AS TO CONTENTS:

Director, Department of Development

APPROVED AS TO FORM AND CORRECTNESS:

Assistant City Attorney